

plaintiff would be prejudiced if the learned Judge's findings of fact were accepted, even so far as they were relevant, as an appeal was lodged against such findings, and it was only because the defendants never asked for the alternative relief which the Court considers appropriate, that this part of the appeal was never argued.

In the result therefore I would allow the plaintiff's appeal in Suit 1 of 1934 with costs in the Court of Appeal and below. The plaintiff will be entitled to an order in terms of the prayer in the amended plaint, and the lien will extend to the plaintiff's costs taxed under this order.

As regards Suit 5 of 1934, no appeal was lodged, but in view of the order of this Court there will be no sums to be set off under paragraphs 5(b) and 6(d) of the decree made thereon, and the decree must be varied accordingly.

In Suit 2 of 1934 the decree must be varied. Paragraphs 3, 4 and 5 must be set aside and in lieu thereof there must be an account and inquiry as indicated above, and the Registrar should report the result in the usual way. The order for payment in paragraphs 6 and 7 will be subject to any deductions in respect of sums found due by the plaintiff as the result of the accounts and inquiry ordered. Paragraph 8, the order for costs, and paragraph 9 can stand. The receiver must pass his final account and be discharged and possession must be restored to the plaintiff. Paragraph 11 can stand. The plaintiff will be entitled to the costs of the appeal, and as against the second defendant, of the second defendant's cross appeal.

As regards Suit 7 of 1934, the decree must be varied. The cross appeal of the second and third defendants will be allowed with costs and paragraph (1) of the decree must be varied by omitting the second and third defendants therefrom. Paragraphs (2) and (3) can stand. Paragraphs (4) and (5) will be set aside and in lieu thereof there will be an account and inquiry as indicated above. In paragraph (6) the Registrar will certify the result of such account and inquiry. Paragraphs 7 and 8 will be set aside. Paragraphs 9 and 10 should be varied by deducting from the amount payable by the first defendant and fourth defendant the amount certified by the Registrar on taking the accounts and inquiries and by omitting paragraphs 9(c) and 10(c). Paragraph 11(a) can stand. Paragraphs 11(b), 11(c) and 11(d) should be set aside; any costs paid under paragraph 11(b) must be repaid. The costs of the issues as to damages in the Court below must be reserved until the further consideration of the action after the taking of the accounts and inquiries directed by the order of this Court in Suits 2 of 1934 and 7 of 1934. The second and third defendants will be entitled to the costs of the issues upon which they have succeeded in their cross appeal. The costs of the accounts and inquiries ordered will be reserved. Paragraph 12 should be varied by omitting the names of the second and third defendants. Paragraph 13 can stand. As to paragraph 14 the receiver should pass his final account and be restored to the plaintiff. Paragraph 15 can stand.

A I would grant a certificate for two counsel in the case of each of the taxations ordered.

Howes J.: I have had the opportunity of reading the judgment which Terrell J. has written. He has expressed so fully my own opinion upon the case that it would be of no service for me to write an independent one. I accordingly concur with his judgment and have nothing to add.

LANSI BIN KAMAN & ANOR. v. SIAH BINTI HAJI TAAT

[A.C.J. (Aitken J.) June 3, 1936]

[Negri Sembilan Magistrate's Civil Appeal No. 4 of 1936]

Contract Enactment (Cap. 52), s.45 — Discharge of one of two joint promisees.

Lansi sued the defendant-respondent in his personal capacity and as administrator of the estate of his deceased father, Kaman, for a sum of \$460, which the defendant-respondent had acknowledged in writing to be due both to Lansi and Kaman. Before Kaman died he released the defendant-respondent from that part of the debt due to him.

Lansi claimed the whole debt of the \$460 on the ground that section 45 of the Contract Enactment (Cap. 52) rendered any release by one only of two joint promisees void and inoperative.

Held: that the release by Kaman was valid and that Lansi was only entitled to judgment against the defendant-respondent in the sum of \$230.

Annappurnamma v. Akkaya, (1913) I.L.R. 36 Mad. 544, considered.

E. Jeff for the plaintiffs-appellants.

M. Farr for the defendant-respondent.

Cur. Adv. Vult.

Aitken J.: The facts out of which this Civil Appeal arises, so far as they are disclosed by the evidence on the record, may be stated concisely as follows:—

[236] The plaintiff is suing both in his personal capacity and as the administrator of the estate of his late father, Kaman bin Katib, who died intestate some time in the latter part of the year 1933. His mother died before his father, apparently early in the year 1932, and some considerable time before her death—according to the defendant in or about the year 1926—the plaintiff's father lent the defendant, who was his niece, a sum of \$460 out of moneys which really belonged to his wife (the plaintiff's mother). This money was lent to the defendant for the purpose of enabling her to buy some padi land at a place called Tanjong Kling, near Rembau, and she bought the land from one Kesom for \$500 though why she did so is by no means clear. At that time the defendant was a married woman living far away at a place called Sungei Siput in Perak, and she has continued to live there up to to-day. She was therefore in no position to farm the land herself, and I see no reason to doubt her statement that she bought the same at her uncle's request. At any rate it is not in dispute that it was her uncle who farmed the land and took all the produce and profits arising from it up to the time of his death. There is no evidence to shew what has been done about the same since then.

Now when the plaintiff's mother died in or about the year 1932, this debt of \$460 was still due and owing and it seems that the right thereto passed to the plaintiff's father and himself in equal shares. At least that is the defendant's evidence, which is fully borne out by all subsequent events and is not really at variance with the plaintiff's evidence on that particular point. Apparently to give effect to this changed position of affairs, and to afford better security for the payment of the debt, the following document was drawn up and signed by the defendant at Rembau on the 8th of March, 1933:—

"I, the undersigned Siah binti Haji Taat of Selemak, Rembau, do hereby acknowledge to have received a sum of Dollars Four hundred and sixty only (\$460) being a loan lent to me by Kaman bin Katib Bacha and Lansi bin Kaman of Tanjong Kling, Rembau, promising to repay them the said amount of \$460 within the period of two years and six months from date hereof.

If the said amount of \$460 cannot be settled within the period as promised I agree to make a charge on my land in E.M.R. No. 1352 in the Mukim of Tanjong Kling. I also agree to allow the said Kaman and Lansi to changkol, plant padi and enjoy the product from the said land until the above loan is satisfied."

The next event in chronological order is very difficult to date even approximately, and the nearest I can venture is to suggest that it occurred sometime in or about the year 1934. Then, according to the defendant, the plaintiff's father sent for her and, when she came, said to her in the presence of her sister Kalina and her brother Jana, "Siah, you owe me \$460. Out of that I have given Lansi \$230. I have given him that long ago. The balance \$230 I give to you because I have enjoyed the sawah." Her evidence continues: "After that the next morning I returned to Sungei Siput. When I was there about four months a telegram came to me saying that Kaman had died. I arrived at the house just before he was buried."

The death of Kaman, the plaintiff's father and the defendant's uncle, seems to have occasioned a serious family quarrel. He died intestate, and a prolonged struggle ensued between the plaintiff on the one side, and the defendant's mother on the other, as to which of them was the proper person to be granted letters of administration. Eventually that question was decided in favour of the plaintiff on the 9th January, 1936, and he lost little time in commencing this action against the defendant claiming from her \$460 as being the amount due to him in his personal capacity and as administrator of his late father's estate under the document of the 8th of March, 1933.

The case came before the learned Magistrate at Rembau on the 6th of April, 1936, and after a thorough and careful investigation he gave the following judgment:—

"I believe the defendant's story that the sum owing to the deceased was relinquished by the deceased in his lifetime in consideration of their being uncle and niece and his having enjoyed the sawah for so many years previously.

I therefore give judgment against the defendant for \$230 in favour of Lansi and half the costs incurred previously to date of this judgment and all costs incurred subsequent to this day."

The appeal was heard by me on the 30th of May, 1936, and in the presence of Mr. Jeff for the plaintiff-

appellant and Mr. Farr for the defendant-respondent. Mr. Jeff came to the real point with commendable brevity by admitting, at once, that he had no hope of persuading me to reverse the learned Magistrate on any ground of fact. He assumed, therefore, for the purposes of his argument, that the plaintiff's father had made an oral statement to the defendant that he released her from any liability to repay the half part of the debt of \$460 which was due to him personally, but he then argued that since the document of the 8th of March, 1933, was an [237] acknowledgment of debt and a promise of payment made to two persons jointly, therefore section 45 of the Contract Enactment rendered any release by one only of such joint promisees void and inoperative. In support of this submission he cited first of all a passage at pages 277 to 279 from the sixth edition of *Pollock and Mulla* on the Indian Contract and Specific Relief Acts. This passage shows that whereas the High Court of Madras has taken the view that a discharge by one of several joint promisees is always valid, the Chief Court of the Punjab and the High Courts of Calcutta and Patna have taken a somewhat different view. According to them there is nothing within the four corners of the Contract Act to show whether or not such a discharge is valid, and we have to look to the general law and see whether the rule of law as laid down in *Wallace v. Kelsall*, 56 R.R. 707 applies, or whether the rule or rather the presumption of equity on which *Steeds v. Steeds*, (1889) 22 Q.B.D. 537 was decided is to prevail. The learned authors favour this latter view.

Mr. Jeff next cited the following short passage from page 869 of the 17th edition of *Chitty on Contracts*:—

"Although a covenant not to sue will operate as a release: yet a covenant by A. not to sue the defendant for any debt due from him to A., cannot be pleaded as a release, in bar to an action by A. and B. for a debt due to them jointly—*Walmesley v. Cooper*, (1839) 11 A. & E. 216." He also drew my attention to section 38(iii) of the Contract Enactment: "An offer to one of several joint promisees has the same legal consequence as an offer to all of them"—a statement which is not entirely free from ambiguity.

On behalf of the defendant-respondent Mr. Farr argued—

(i) That the document of the 8th of March, 1933, was not a contract at all, since it was not executed by either the plaintiff or his father: at the most it was only an acknowledgment of indebtedness.

(ii) If it was a contract, then there was a distinct subsequent oral agreement modifying its terms, to wit, the agreement between the plaintiff's father and the defendant releasing the debt to the extent of \$230 which could be proved and rendered effective in accordance with the fourth proviso to section 92 of the Evidence Enactment. As to the first of these arguments, the illustration (e) to section 25 of the Contract Enactment appears to be in point. It reads as follows:—

"A. owes B. \$1,000, but the debt is barred by the Limitation Enactment. A. signs a written promise to pay B. \$500 on account of the debt. This is a contract." If a statute-barred debt is a good consideration to support a promise to pay something and to make such a promise a valid enforceable contract, *a fortiori* a debt which is not statute-barred must have the same effect.

So also, if we turn to section 2(d) of the Contract Enactment we find that "when at the desire of the promisor, the promisee or any other person has done.....something, such act is called a consideration for the promise." I think these two references to the provisions of our Contract Enactment suffice to dispose of Mr. Farr's first argument.

His second contention raises a somewhat difficult point of law on which Mr. Jeff might have relied during his opening argument. Section 92 of the Evidence Enactment provides, *inter alia*, that when the terms of a contract have been reduced to the form of a document and proved by the production of the same, "no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms." The rule merely binds to a given relation of the transaction itself. Accordingly subsequent waiver or discharge may be shown, and the fourth proviso to section 92 incorporates the rule laid down by Lord Denman in *Goss v. Nugent*, 5 B. & Ad. 58 who said:—

"After an agreement has been reduced into writing, it is competent to the parties at any time before breach of it, by a new contract not in writing either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement."

[238] So far it is plain sailing, but Mr. Jeff, in his reply, pointed out that the plaintiff was not a party to the subsequent oral agreement between his father and the defendant purporting to waive payment of half the total debt, and argued that for this reason the plaintiff cannot be bound by it. I must admit that this particular argument has caused me some little anxiety. Mr. Jeff thought that there was no report of the case *Walmesley v. Cooper*, *supra*, on which he relied, and which he had previously cited, in the Seremban Law Library. In that respect he was wrong, for I have found a good report of it in L.J. 1841 Vol. 10 of the New Series at p. 49. After studying that report I have come to the conclusion that the decision in that case, where the effect of a cove- [238] nant by one of two joint creditors not to sue their debtor was the sole question before the Court, rests upon an old rule of pleading which is stated by Lord Denman C.J. in his judgment in the following terms:—

"A covenant not to sue has been held equivalent to a release on no other principle than that of avoiding circuity of action, i.e. the scandal and absurdity of allowing A. to recover against B. in one action, the identical sum which B. has a right to recover in another action against A. The law, where it clearly detects the possibility of such a waste of the suitor's money and its own process, as well as of the public time, will interfere to prevent its happening. But if the parties thus opposed in interest are not the same, the principle cannot apply. If one of two plaintiffs covenant not to sue for a joint debt, he may be liable for a breach of that covenant, if both afterwards sue. But if he is then sued by the debtor for breach of covenant, he alone must answer for it: the two will have recovered according to the defendant's obligation to them; but that one only will be compellable to refund who has entered into a counter-obligation with their debtor not to sue him."

Here, fortunately, the oral agreement between the plaintiff's father and the defendant was an out and out waiver or release of half the debt, so that the principle on which *Walmesley v. Cooper*, *supra*, was decided has no application thereto. The general rule is that to be found set out at p. 869 of the 17th edn. of *Chitty on Contracts*: "A release of a debt . . . by one of several joint creditors . . . is, in law, a discharge of the debt." That being so, then *a fortiori*, the release of half a debt of one of two joint creditors must surely be a discharge of that half part.

We can now return to the passage at pp. 277 to 279 of the 6th edn. of *Pollock and Mulla* on the Indian Contract and Specific Relief Acts, on which Mr. Jeff placed especial reliance.

Personally I prefer the view expressed by White C.J. in *Annapurnamma v. Akkaya* (1913) I.L.R. 36 Mad. 544, to that which commended itself to his colleagues on the Full Bench of the Madras High Court, but so far as this appeal is concerned it does not seem to me to matter which view is the correct one. If the document of the 8th of March, 1933, evidences a promise to pay \$460 to two joint creditors, then, since a release of the whole debt by one of them would have been a good discharge, *a fortiori* a release of half the debt by one of them must be an equally good discharge of that half part. If, on the other hand, upon a true construction of this document the promisees are to be taken to be tenants in common and not joint tenants of the debt in accordance with the presumption of equity on which *Steeds v. Steeds*, *supra*, was decided, a construction which commends itself to me, then the plaintiff's father was obviously entitled to release his own half share of the debt, and the plaintiff cannot justify complaint of his father's action in that respect.

For the reasons which I have endeavoured to make plain in the course of a rather lengthy judgment this appeal must, in my opinion, be dismissed, and with costs.

Appeal dismissed.

[239] STRAITS SETTLEMENTS REPORTS

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KHOO BOO GAY v. THE HOME INSURANCE CO. LTD.

[O.C.J. (Terrell J.) November 14, 1934]

[Singapore Suit No. 637 of 1933]

[Summons in Chambers No. 932 of 1934]

Practice — Discovery — Non-compliance with an order for — Dismissal of action — Setting aside judgment — Discretion.

A default judgment may in a proper case be set aside and the whole matter re-opened at the instance of the Official Assignee of the property of an absconding bankrupt plaintiff who has failed to comply with an order for discovery, if the Court is satisfied that the application is not frivolous or vexatious and has merits.

SUMMONS IN CHAMBERS.

Walters for the Official Assignee of the property of Khoo Boo Gay (applicant).

Briggs for the defendants.